

**IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF VERMONT**

**UNITED STATES OF AMERICA**

**VS.**

**DONALD FELL**  
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**CRIMINAL 5:01-cr-00012**

**DEFENDANT DONALD FELL’S MOTION TO DECLARE THE FEDERAL DEATH PEN-  
ALTY ACT UNCONSTITUTIONAL FOR FAILURE TO  
REQUIRE COMPARATIVE PROPORTIONALITY REVIEW RESULTING IN  
ARBITRARY & DISCRIMINATORY DEATH SENTENCES**

Now Comes Donald Fell, through his undersigned counsel and moves this Honorable Court for an order dismissing and/or striking the Amended Notice Of Intent To Seek Penalty Of Death. (Doc. 609) because

Because the Federal Death Penalty Act (“FDPA”) does not include a provision for comparative proportionality review, it is unconstitutional under the Eighth Amendment. Comparative proportionality review promotes “consistency, fairness, and rationality in the evenhanded operation of the” death penalty system, *Proffitt v. Florida*, 428 U.S. 242, 253, 258, 260 (1976) (Op. of Stewart, Powell & Stevens, JJ.), and “substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.” *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (Op. of Stewart, Powell & Stevens, JJ.). For this reason the majority of states that authorize capital punishment require proportionality review of every death sentence and that reliability is lacking under the federal system. The absence of such procedural safeguards results in arbitrarily imposed death sentences in violation of the Eighth Amendment.

Accordingly and as described in greater detail in the accompanying Memorandum, Mr. Fell respectfully requests this Court strike the death notice based on a finding that the FDPA is unconstitutional on its face. In the alternative, an evidentiary hearing is warranted on this significant issue so that counsel may present data and expert testimony in support of his arguments.

Dated at San Francisco, California, this 16th day of November, 2015.

Respectfully Submitted,

MICHAEL N. BURT  
KERRY B. DeWOLFE  
JOHN T. PHILIPSBORN

By: /s/ Michael N. Burt

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 16, 2015, I electronically filed with the Clerk of

**DEFENDANT DONALD FELL'S MOTION TO DECLARE THE FEDERAL DEATH  
PENALTY ACT UNCONSTITUTIONAL FOR FAILURE TO  
REQUIRE COMPARATIVE PROPORTIONALITY REVIEW RESULTING IN  
ARBITRARY & DISCRIMINATORY DEATH SENTENCES**

using the CM/ECF system. The CM/ECF system will provide service of such filing(s)  
via Notice of Electronic Filing (NEF) to the following NEF parties:

Michael N. Burt, Esq.  
Kerry B. DeWolfe, Esq.  
John Phillipsborn  
William B. Darrow, Esq., Assistant United States Attorney  
Bruce R. Hegyi, U.S. Dept. Of Justice

I also caused to be served, by U.S. Postal Service, the following non-NEF party:

Donald Fell  
Register Number 05306-010  
The Metropolitan Detention Center  
P.O. Box 329002  
Brooklyn, NY 11232

Dated at San Francisco, California, this 16th day of November, 2015.

By: /s/ Michael N. Burt

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